No. 77-420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY OF PETITIONER

The United States Independent Telephone Association (USITA), Petitioner in No. 77-420, respectfully submits its reply to the Briefs in Opposition filed by MCI Telecommunications Corp. (MCI) and Southern Pacific Communications Co. (SPCC).

Both MCI and SPCC, extolling the virtues of the decision below, seek to persuade the Court that that decision was not only right but also that it involved but a narrow and limited issue, with the only result of the decision being a remand to the Federal Communi-

cations Commission (FCC) for further proceedings. MCI and SPCC completely miss the central point of this case and the basic reason why certiorari should be granted and the case set for plenary review.

I. THE DECISION BELOW HAS IMMEDIATE, UNLIMITED AND GRAVE FEDERAL IMPACT.

Underlying the horrendous practical consequences of the decision below, *one* of which is the spectre of years of FCC proceedings on remand,[1] is a Federal question of primary importance and universal applicability in the ongoing authorization of all common carrier communications facilities by the FCC. This is a question that FCC is powerless to address, much less answer and resolve, in proceedings on remand.

Simply stated, the basic question here is whether over many years the FCC has correctly read and applied its statute as authorizing it to grant certificates of public convenience and necessity "as applied for,"[2] with the affirmative grant defining the scope of the authorization, or whether in addition to its affirmative grant, the FCC must also measure each and every application submitted to it against the total universe of possible common carrier communication services, and then specifically and affirmatively find that the

[1] These involved and lengthy proceedings would be required only if the novel theory of Federal statutory construction devised by the court below is left standing. Moreover, the further proceedings that would be required in this case exemplify the regulatory morass into which, under the court's theory, the Commission must plunge in all certificate cases. If the Commission has correctly followed its statute and its precedents, however, its task has already been completed.

[2] Communications Act of 1934, Section 214 (47 U.S.C. 214); Pet. App. 6c.

public convenience and necessity does not require facilities and services not proposed by the applicant. It is this second and essentially negative non-statutory finding that is newly mandated by the decision below.

Truly, the situation in the particular MCI case at bar is exacerbated by the repeated and emphatic representations by the MCI applicant that it sought authorization to provide only "specialized" private line services and had no intention whatever of engaging in the furnishing of plain old telephone service, with the FCC granting MCI precisely the authority it sought. The fundamental issue here, however, is far broader than the case of MCI, SPCC, or of any other particular applicant, and can and should be decided by the Court without regard to the presence or identity of the private parties to this case. Indeed the case goes directly and immediately to the very heart of the Commission's execution of its common carrier regulatory duties and the nature and scope of its statutorily required public interest, convenience and necessity findings and conclusions.

II. THE DECISION BELOW CONFLICTS WITH THE STATUTE AND OTHER DECISIONS.

A. The Certificate Statute And Decisions.

By its statute (specifically Section 214 of the Communications Act),[3] if the Commission finds and concludes "that the present or future public convenience and necessity require or will require"[4] the construction of new facilities, it may issue its certificate authorizing that construction. And as the court below

[3] *Ibid.*

[4] *Ibid.*

acknowledged, ". . . it is analytically impossible to determine the need for a new facility without considering the services to be provided over it."[5] To aid it in making its public convenience and necessity findings and conclusions, the Commission has promulgated rules which require that every application for a certificate of public convenience and necessity must contain showings, *inter alia,* of the public need for the proposed facilities, of economic justification for the proposed project, of how existing communications services are being furnished and reasons why existing facilities are inadequate, and of proposed tariff charges and regulations.[6] Thus is the FCC informed of precisely what authority is sought by an applicant.

In a broad yet detailed rulemaking proceeding,[7] the Commission evaluated, in the light of its statute and its rules, hundreds of "specialized" certificate applications pending before it. The Commission concluded, as a matter of general policy, that there was a public need for the new specialized communications services proposed; that new entry into the specialized private

[5] *Slip op.* at 23; Pet. App. 23a.

[6] FCC Rules and Regulations, Sec. 63.01; 47 C.F.R. § 63.01. The decision below would make a mockery of these FCC Rules, for if it is permitted to stand, an applicant could propose a new communications service, obtain Commission authorization, find its market estimates for the new service entirely too optimistic, and then proceed to try its luck with any other service, thus converting its authorized facility to a purpose never considered by FCC and for which initial authorization would not have been given. The possibility for error, abuse, or misrepresentation under these circumstances is limitless.

[7] *Specialized Common Carrier Services,* FCC Docket No. 18920, 24 FCC 2d 318 (1970); 29 FCC 2d 870 (1971); 31 FCC 2d 1106 (1971).

line communications market would produce specific public benefits, and would have little adverse effect on existing carriers; and that grant of the pending specialized carrier applications would serve the public interest, convenience and necessity.[8]

The nature and scope of this general specialized private line policy, pursuant to which thousands of grants (including the MCI grants at issue below) were in fact made by the Commission, were fully understood by the Commission itself, by the new applicants, by those existing carriers who opposed the policy, by State utility regulatory bodies, and by reviewing courts.[9] Indeed, even the *MCI* court, in the opinion below, did not quarrel or take issue with the nature and scope of the Commission's affirmative *Specialized Carrier* policy.[10]

B. The Error In The Decision Below.

What the *MCI* court did, however, was to first devise its own novel theory of "implicit restrictions,"[11] a theory it gratuitously imputed to FCC. Having found this theory inadequate the *MCI* court then proceeded

[8] *Id.*

[9] See, *e.g., Specialized Common Carrier Services, supra; aff'd, Washington Utilities and Transportation Com.* v. *FCC,* 513 F.2d 1142 (9th Cir.) *cert. denied,* 423 U.S. 836 (1975); *United States Transmission Systems, Inc.,* 48 FCC 2d 859 (1974); *aff'd, AT&T* v. *FCC,* 539 F.2d 767 (D.C. Cir. 1976); *Bell System Tariff Offerings,* 46 FCC 2d 413 (1974); *aff'd, Bell Telephone Co. of Pa.* v. *FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026, *reh. denied,* 423 U.S. 886 (1975); *Specialized Common Carriers,* 44 FCC 2d 467 (1973) 50 FCC 2d 416 (1974).

[10] *Slip op.* at 26; Pet. App. 26a.

[11] *Slip op.* at 16; Pet. App. 16a.

to judicially amend the Commission's statute and its rules to impose on the Commission a second public interest finding requirement, *i.e.*, the making in all application cases of "an affirmative determination that the 'public convenience and necessity may require'[60] a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application. * * *[60] 47 U.S.C. § 214(c) (1970)."[12]

In so holding, the court below committed a double fault. First, the court failed to acknowledge the adequacy of the basic affirmative public interest finding required of the Commission by its Section 214(a), absent which no carrier may construct any line for any purpose, and the Commission's specific authority "to issue such certificate *as applied for*."[13] Second, the court misconstrued the statutory provision that the Commission "*may* attach to the issuance of the certificate such terms and conditions *as in its judgment* the public convenience and necessity may require"[14] to mean that the Commission *must* attach terms and conditions to a certificate, without regard to whether in its judgment terms and conditions are necessary, and if it does not do so, its grants are unrestricted.[15]

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[12] *Slip op.* at 26; Pet. App. at 26a.

[13] Section 214(c), 47 U.S.C. 214(c); Pet. App. 7c; emphasis supplied.

[14] *Ibid.*

[15] The apparent assumptions by the court below that the phrase "terms and conditions" equals "restrictions and limitations," and that the scope of an authorization can be limited only by the imposition of terms and conditions, are unwarranted grammatically or legally. Surely the Commission may grant a certificate "as applied for" without adding "but not as not applied for."

In these faults lies the fatal flaw in the decision below, a flaw which if not corrected here and now by the Court will have immediate and devastating effect on the processing of every wire and radio application[16] now or in the future submitted to the Commission. Were the decision below allowed to stand, each and every application for certificate or license must then be measured not only against the statutory standard, *i.e.*, whether the facilities and services proposed are required by the public convenience and necessity, but each and every application must also be the subject of a second and further judicially mandated new inquiry into whatever public interest considerations might be involved in the provision of other communications services for which the applicant has not sought authorization or even has expressly disclaimed any intention of offering.

Clearly, then, it matters not whether the applicant's name is MCI, SPCC or John Doe; and it matters not whether the communications service is called Execunet, SPRINT, or by another name. The court below has ordered an immediate and fundamental change in the FCC's consideration and disposition of all certificate applications. Even clearer is the fact that the fundamental and significant Federal question arising out of the decision below is not a limited issue that can be resolved by the FCC in proceedings on remand, for the FCC can neither ignore nor modify the court's directive. Thus the question presents an issue unlimited in scope that can only be resolved on plenary review by the Court.

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[16] The Section 214 common carrier provisions are mirrored in the Section 308 language in respect of radio licenses.

III. CONCLUSION.

For these reasons, together with those advanced in its Petition, USITA respectfully prays that the writ issue.

Respectfully submitted,

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